INSURANCE COMPANY OF NORTH AMERICA

IBLA 90-218 Decided September 23, 1991

Appeal from a decision of the Colorado State Office, Bureau of Land Management, requiring payment under a nationwide oil and gas geophysical exploration bond for costs of replugging improperly plugged shot holes. CO-0249.

Reversed.

1. Oil and Gas Leases: Bonds--Regulations: Applicability

> Under the regulations governing bonds for oil and gas geophysical exploration, liability for a particular oil and gas geophysical exploration operation automatically terminates by operation of law on the 91st day following the filing of a notice of completion of oil and gas exploration operations if BLM fails to notify the party filing the notice within 90 days of the filing that all terms and conditions have been met or that additional action is required to rehabilitate the lands. Where BLM fails to provide such notice and a number of years later seeks to collect on the nationwide oil and gas geophysical exploration bond for the costs of correcting improperly plugged shot holes, the regulation precludes such collection.

APPEARANCES: Richard L. Williams, Esq., Casper, Wyoming, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Insurance Company of North America (INA) has appealed from a January 19, 1990, decision of the Chief, Fluid Minerals Adjudication Section, Colorado State Office, Bureau of Land Management (BLM), requesting payment under nationwide oil and gas geophysical exploration bond CO-0249 (69HF2412) in the amount of $38,678.63 for the costs of replugging improperly plugged shot holes. BLM had accepted the $50,000 bond, which named Sefel Geophysical Ltd. (Sefel), a Canadian company, as principal and INA as surety, on October 27, 1983.

On July 24, 1984, Sefel filed a notice of intent to conduct oil and gas exploration operations with the BLM Platte River Resource Area

Office in Casper, Wyoming, pursuant to the requirements of 43 CFR 3045.2-1 (1987). 1/ Sefel proposed to conduct seismic shot hole geophysical exploration along approximately 28-1/2 miles of certain public lands in Natrona and Fremont Counties, Wyoming. 2/ Sefel was undertaking the exploration on behalf of SOHIO Petroleum.

On July 30, 1984, Sefel agreed that it would comply with the specific practices established for geophysical exploration operations on public land in Wyoming, including the requirement that "[s]ealing, plugging, and capping of drill holes will conform to the requirements of Wyoming Statutes 35-11-404, 1977" (Exh. 1 attached to BLM's Answer). On August 1, 1984, BLM approved Sefel's notice of intent.

On October 5 and 19, 1984, in accordance with 43 CFR 3045.2-2 (1987), Sefel filed notices of completion of oil and gas exploration operations with BLM. 3/ By form letters dated October 11 and 24, 1984, BLM informed Sefel that the notices of completion had been received, but that existing weather conditions had prevented the inspection of the shot hole lines for compliance with the provisions of the notice of intent and BLM district guidelines. The letters stated that, weather permitting, BLM would check the lines by September 1, 1985, and would notify Sefel of its findings.

By letter dated April 14, 1986, Sefel's trustee notified BLM that Sefel had been placed in bankruptcy on November 28, 1985.

Due to manpower and funding constraints, BLM did not inspect the shot hole lines until 1987 when it discovered 10 flowing or seeping holes. Further examination revealed that these holes had not been plugged in accordance with the requirements attached to the notice of intent.

By letter dated September 22, 1987, BLM notified Sefel, through its bankruptcy trustee, that 10 improperly plugged shot holes had been discovered, and that these holes would need to be re-entered and replugged in conformance with Wyoming Oil and Gas Conservation Commission (WOGCC) Rule 339 to stem the flow of water and to prevent further commingling of water aquifers. BLM stated that the work had to commence within 30 days and that failure to comply with the letter would result in attachment of Sefel's bond. A copy of this letter was sent to INA.

1/ The regulations governing onshore oil and gas geophysical exploration were revised in 1988 and are now found in 43 CFR Part 3150.

2/ In BLM's answer it explained at page 3, footnote 3:

"Shot hole geophysical exploration in those counties is typically conducted by drilling a series of holes along a line, spaced at up to 16 holes per mile. Each hole is 100 to 150 feet deep, and a charge of from 10 to 40 pounds of dynamite is placed in the hole. Sensors on the surface are connected to special equipment and the dynamite is detonated."

3/ The case file contains only one notice of completion which indicated that operations were finished on Oct. 4, 1984. BLM, however, has consistently referred to the filing of two such notices of completion.

In a letter dated October 1, 1987, Sefel's trustee advised BLM that Sefel would not be performing the replugging work and enclosed a blank proof of claim form for BLM to complete to claim any amounts owed by Sefel after the bond funds had been exhausted. By letters dated October 22, 1987, and January 20, 1988, BLM informed INA of Sefel's default and requested written authorization to act as INA's agent to contract and oversee the required shot hole plugging operations.

INA agreed, and by letter dated August 15, 1988, BLM notified INA that it had a received a bill in the amount of $11,321.37 for the proper plugging of the 10 seeping and flowing holes and 3 additional holes that had appeared, on the surface, to be properly plugged but were found to be open below 20 feet and full of water to that elevation. BLM requested INA to pay the bill directly to the company which had plugged the holes. BLM also indicated that it had reason to believe that Seismic Enterprises, Inc. (SEI), Sefel's hole plugging contractor, had improperly plugged the majority of the shot holes located on public land. INA paid the $11,321.37 bill without protest or comment in September 1988.

BLM apparently attempted unsuccessfully to persuade INA to release the remainder of the $50,000 bond, and in a letter dated December 29, 1988, counsel for INA apprised BLM that INA would not make any further payments on the bond and was considering seeking reimbursement of the funds already released. INA based its position on 43 CFR 3045.4(c) (1987) which provides for the automatic termination of bond liability on the 91st day after the filing of a notice of completion of operations if BLM fails to notify the party within 90 days of the date of filing that all terms and conditions have been met or that additional work is needed to rehabilitate the land. INA concluded that because BLM did not notify Sefel of any problems with the shot holes until September 1987, over 2 years after they were to have been inspected, both it and Sefel had been released, by the terms of the regulation, from liability for that exploration operation.

BLM responded to INA by letter dated June 14, 1989, stating that fraud was apparently involved in plugging the shot holes and, therefore, 43 CFR 3045.4(c) (1987) was inapplicable. BLM informed INA that it intended to pursue acquisition of the remaining $38,678.63 in Sefel's nationwide bond. Accordingly, the Wyoming State Office requested that the Colorado State Office, BLM, attach the bond for the proper plugging of the shot holes.

In its January 19, 1990, decision, the Colorado State Office, BLM, concluded that Sefel's shot holes had been improperly plugged, and that fraud was apparently involved in reporting proper plugging of the shot holes. It estimated the cost of properly plugging the holes at more than $80,000. BLM determined that Sefel was in default and that, therefore, INA was required to pay the $38,678.63 remaining on the $50,000 nationwide geophysical exploration bond.

On appeal INA incorporates the arguments raised in its December 29, 1988, letter. It essentially argues that BLM's decision must be reversed because 43 CFR 3045.2-2 (1987) and 43 CFR 3045.4(c) (1987) establish that

any liability under the bond terminated prior to BLM making any claim on the bond.

In its answer, BLM does not dispute that it failed to timely inspect the shot hole lines and inform Sefel of the needed additional work. BLM focuses instead on the actions of Sefel's agent for plugging the holes, SEI. BLM asserts that not only did SEI improperly plug the holes, but that it did so using a method which gave the appearance that the holes were properly plugged and which would have prevented BLM from discovering the improper plugging even if BLM had timely inspected the lines. BLM contends that there is abundant evidence demonstrating that SEI knowingly engaged in a scheme to improperly plug the holes and to fraudulently conceal that improper plugging from BLM, the State of Wyoming, and others, citing affidavits attached to its answer and a 1986 investigation and hearing conducted by WOGCC concerning other seismic lines plugged by SEI.

BLM recognizes that 43 CFR 3045.4(c) (1987) provides that liability for a particular exploration operation automatically terminates on the 91st day following the filing of a notice of completion. It contends, however, that 43 CFR 3045.3-7 (1987) requires that the notice of completion contain a declaration that the party has complied with all terms and conditions of the approved permit. 4/ BLM asserts that "[t]he filing of a notice of completion in which the person filing it declares that all terms and conditions have been satisfied when there has been a fraudulent concealment of the fact that they have not does not satisfy the requirements of the regulation" (Answer at 8). It maintains that such a fraudulent notice of completion is the equivalent of no notice of completion, and that the filing of such a fraudulent notice of completion effectively eliminates 43 CFR 3045.4(c) (1987) as an issue in this case.

BLM equates the 90-day regulatory period during which BLM must notify the party conducting the exploration activities that the terms and conditions have been met or that additional action must be taken with a statute of limitations. It argues, therefore, that SEI's fraudulent concealment of the improper plugging tolled the running of the 90-day period until the improper plugging was discovered, asserting that a routine inspection of the plugged shot holes within the 90-day period would not have revealed SEI's fraudulent plugging practices. BLM also insists that since, as a general rule, part payment of an obligation by a surety extends a period of limitation and waives the bar such a statute of limitations might otherwise impose, INA's part payment of the bond obligation 4 years after the 90-day regulatory period, without protest and with knowledge that other holes were probably improperly plugged, waives the bar of that regulation.

4/ The regulation cited by BLM, 43 CFR 3045.3-7, was part of the regulations controlling oil and gas geophysical exploration operations in Alaska (43 CFR 3045.3, now found at 43 CFR Subpart 3152). These regulations were (and continue to be) more stringent than those governing exploration outside Alaska and required, inter alia, approved geophysical exploration permits, not simply notices of intent to conduct geophysical operations. Compare 43 CFR 3045.3 (1987) with 43 CFR 3045.2 (1987).

[1] From their inception, the Departmental regulations relating to oil and gas geophysical exploration on public lands have provided for the automatic termination of liability for a particular oil and gas exploration operation on the 91st day following the filing of a notice of completion absent notification from the BLM authorized officer, within 90 days of that filing, that additional action must be taken. See 43 CFR 3107.1-4 (1968); 32 FR 8968, 8970 (June 23, 1967). The regulation in effect during the relevant time, 43 CFR 3045.4(c) (1987), provides:

> The authorized officer shall not consent to the cancellation of the bond or to the termination of liability unless and until all of the terms and conditions of the notice of intent, permit or lease have been met. Should the authorized officer fail to notify the party within 90 days of the filing of the notice of completion that all terms and conditions have been met or that additional action shall be required to rehabilitate the lands, liability for that particular exploration operation shall automatically terminate on the 91st day. [5/]

The current regulation, 43 CFR 3154.3, retains the automatic termination provision. 6/

Although BLM asserts that 43 CFR 3045.3-7 (1987) requires that a notice of completion contain certain specific information, including a statement that all terms and conditions have been satisfied, such regulation has no relevance to this appeal because it applies only to oil and gas geophysical exploration operations conducted in Alaska, not to such exploration in other states. See note 4, supra. The regulation applicable to exploration outside Alaska, 43 CFR 3045.2-2 (1987), simply requires that, upon completion of exploration activities, "there shall be filed with the District Manager a Notice of Completion of Oil and Gas Exploration Operations," and provides that BLM must notify the filing party within 30 days of the filing "whether all of the terms and conditions set out by the regulations in this subpart and in the notice of intent have been met, or what additional action shall be required to rehabilitate the lands, specifying the nature and extent of the required action." 7/

5/ When the Department proposed this version of the regulation, it received comments objecting to the 90-day period as being inadequate to make a compliance determination given mitigating factors such as heavy snow cover in Alaska. Despite these concerns, the Department considered the 90 days adequate and retained the proposed language. See 48 FR 33648, 33649 (July 22, 1983).

6/ The proposed version of 43 CFR 3154.3 would have given BLM only 30 days in which to notify an operator under a notice of intent of the need for additional action. 52 FR 22592, 22618 (June 12, 1987). All the comments BLM received on this proposed regulation expressed concern that 30 days was not an adequate period for inspection of lands subject to geophysical exploration, and as a result, BLM retained the 90-day period found in the earlier regulations. See 53 FR 17340, 17349 (May 16, 1988).

7/ INA states that BLM's October 1984 notices to Sefel that the shot holes would not be immediately inspected due to weather conditions, but would be

Under 43 CFR 3045.2-2 (1987), Sefel was not required to declare in its notice of completion that it had satisfied the terms and conditions of its notice of intent. In fact, BLM Form 3045-2 (January 1973) entitled "Notice of Completion of Oil and Gas Exploration Operations," which was filled out and filed by Sefel, simply states: "Pursuant to the notice heretofore filed to conduct oil and gas operations, this is to advise that operations were completed on 10-4-84, on the lands described on the previous notice." BLM has not convinced us that Sefel's notice of completion was fraudulent and tantamount to no notice of completion, and, thus, failed to trigger the 90-day regulatory period.

Furthermore, although the record supports the conclusion that SEI knowingly plugged the holes improperly and in a manner designed to conceal the improper plugging from detection, BLM has not demonstrated that Sefel was aware of these actions or that SEI's knowledge should be imputed to Sefel. In fact, the record indicates that SEI apparently billed Sefel for the amount of materials and time it would have taken to properly plug the shot holes (see BLM Answer, Exh. 7, Transcript of Hearing before WOGCC, Docket No. 195-86, at 38-43), thus hiding the improper plugging from Sefel and collecting unearned money.

As a general rule, the knowledge of an agent is not imputed to the principal where the agent for any reason has a motive or interest in concealing the facts from the principal such as when he acts for his own personal interest and adversely to the principal. See 3 Am. Jur. 2d Agency § 290 (1986). Clearly, SEI had a financial incentive to conceal its fraudulent actions from Sefel; therefore, Sefel cannot be charged with knowledge of such actions. Thus, a statement by Sefel that it had satisfied the terms and conditions of its notice of intent would not have been fraudulent since there is no evidence that it knew of the improper plugging.

Once Sefel filed its notice of completion, the 90-day period afforded by 43 CFR 3045.4(c) (1987) began. BLM characterizes this 90-day period as similar to a statute of limitations and subject to the corresponding tolling and waiver rules. The regulation provides for the automatic termination of liability for the particular exploration operation on the 91st day after filing of the notice of completion unless within the 90-day period BLM takes affirmative action to notify the party that (1) the terms and conditions have not been met or (2) additional action is needed to rehabilitate the lands. The only notice BLM provided to Sefel within that 90-day period was that it would inspect the shot holes by September 1, 1985, and notify Sefel of the results. 8/ That notice did not state that there had been a failure to comply with the terms and conditions of the notice of intent or that additional action was required to rehabilitate the lands. We cannot find that BLM's notice had the effect of tolling the

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footnote 7 (continued)
inspected by Sept. 1, 1985, arguably complied with this regulation. See INA's Dec. 29, 1988, letter at 2.
8/ Arguably those letters were issued by BLM to comply with the notice requirement of 43 CFR 3045.2-2 (1987).

running of the 90-day time period. In addition, even if we were to consider that such notice tolled the time period until September 1, 1985, BLM still did not notify Sefel of the improper plugging until over 2 years after that date. 9/

The regulation is clear. If BLM fails to timely notify the party in accordance with the provisions of the regulation, liability terminates by operation of law; the reason for BLM's failure is not a consideration.

We have consistently held that duly promulgated regulations have the force and effect of law and are binding on the Department. See, e.g., Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990), and cases cited therein. BLM has no authority to disregard plain and unambiguous Departmental regulations, and is bound to follow them. Joseph J. C. Paine, 83 IBLA 145, 147 (1984); Keith S. Rush, 36 IBLA 76, 79-80 (1978); Arizona Public Service Co., 20 IBLA 120, 123 (1975). We find that, in accordance with 43 CFR 3045.4(c) (1987), liability for this particular geophysical exploration operation has automatically terminated by operation of law, and BLM is not entitled to collect the amount sought on the bond. 10/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

9/ BLM also argues that "[a]s a general rule, part payment of an obligation by a surety extends a period of limitation and waives the bar of a statute which might otherwise have been imposed," citing 51 Am. Jur. 2d, Limitation of Actions § 387. BLM asserts that INA's part payment in 1988 "waives the bar" of 43 CFR 3045.4(c) (1987). Because liability for the exploration operation terminated by operation of law on the 91st day following the filing of the notices of completion, INA's partial payment in 1988 could not constitute a waiver of such a regulatory requirement.

10/ BLM states in its answer at page 6, footnote 4, that British Petroleum (BP) has acquired SOHIO and has assumed responsibility for properly plugging Sefel's shot holes, although BLM represents that it is BP's position that "Sefel's bond should be used to fund part of the cost of the plugging."